

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-95-5/18-PT**

**IN THE TRIAL CHAMBER**

**Before:        Judge Iain Bonomy, Presiding  
                 Judge Christoph Flugge  
                 Judge Michele Picard**

**Registrar:    Mr. John Hocking**

**Date filed:    25 June 2009**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADZIC**

*PUBLIC*

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**RESPONSE OF THE UNITED STATES OF AMERICA  
TO THE ACCUSED'S "MOTION FOR SUBPOENA TO LT. GENERAL  
DOUGLAS LUTE AND COL. JOHN FEELEY (RET.)"**

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**Office of the Prosecutor:**

**Mr. Alan Tieger**

**Ms. Hildegard Uertz-Retzlaff**

**The Accused:**

**Mr. Radovan Karadzic**

**United States:**

**Ms. Denise G. Manning**

**Ms. Karen K. Johnson**

**Ms. Anne Joyce**

## **I. Introduction**

1. Accused's request for the issuance of a subpoena to two United States Government officials, Lt. Gen. Douglas Lute and Mr. John Feeley ("Request"),<sup>1</sup> is nothing more than a fishing expedition. Since December 11, 2008, when Accused first contacted the United States to request information about an "immunity agreement" allegedly entered into by Ambassador Richard Holbrooke, the United States has striven to proceed cooperatively and with all due speed to respond to Accused's increasingly redundant requests for assistance. However – and notwithstanding the United States' efforts – Accused continues to request information about the alleged agreement, and to discount or disbelieve the information provided, eventually filing the subpoena request at issue here. This request fails to meet the most basic standards for the issuance of a subpoena, and the United States respectfully requests that it be denied.

## **II. U.S. Cooperation**

2. The United States has gone to extraordinary lengths to respond to Accused's multiple requests for assistance on an expedited basis. The United States has conducted Government-wide searches for documents, made available two high-ranking U.S. Government officials for interviews, declassified and made available eight documents, provided two signed witness statements and provided, in writing, information from the two individuals for whom Accused now seeks a subpoena.<sup>2</sup>

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<sup>1</sup> *Prosecutor v. Karadzic*, Motion for Subpoena to Lt. General Douglas Lute and Colonel John Feeley (Ret.), 17 June 2009 [hereinafter Request].

<sup>2</sup> The United States has undertaken these extraordinary measures despite serious reservations about the stated purpose of Accused's request – namely, to obtain information about an agreement that was never made. Not surprisingly, none of the information provided established the existence of any such agreement. Moreover, the United States provided this assistance with full knowledge that the Pre-Trial Chamber determined on December 17, 2008 that the information was not "material to the preparation of the defence" and in fact stated that Accused's argument about an alleged agreement "is without substantive basis." *Karadzic*, Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, paras. 25-26. The Pre-Trial Chamber did, however, grant Accused's request in part given that a future Trial Chamber may determine the material potentially relevant for any eventual sentence. *Id.* at para. 23.

3. More specifically, following Accused's initial request, U.S. Government representatives corresponded and met with Accused's legal associate to discuss modalities for cooperation, and then, only two weeks after issuance of a Rule 70 order to protect the relevant information,<sup>3</sup> the United States authorized an interview of Ambassador Goldberg, which took place on April 16, 2009.
4. In addition, on April 15, 2009, the United States provided Accused, under Rule 70, several declassified documents responsive to Accused's request. Shortly thereafter, the United States provided Accused two additional documents under Rule 70 and a Statement by Ambassador Goldberg, and authorized use of all the documents in court.
5. Accused, however, apparently did not find the United States' cooperation satisfactory and described the results of the search as "impossible to believe." He also requested an interview with Ambassador Lawrence Butler regarding the same meetings he had discussed with Ambassador Goldberg, in order to ask Ambassador Butler the same questions he had asked Ambassador Goldberg.
6. Although the United States had reservations regarding the repetitive nature of Accused's second interview request, the United States agreed to assist Accused by making Ambassador Butler available. Moreover, to accommodate Accused's timeframe for submitting his Preliminary Motion, the United States expedited its authorization process, completing the entire process -- from request to interview -- in a total of eight working days.<sup>4</sup>
7. Unfortunately, these extraordinary efforts also did not satisfy Accused. Immediately following Ambassador Butler's interview, in which Ambassador Butler corroborated Ambassador Goldberg's statements in all relevant respects, Accused requested additional interviews with Lt. Gen. Douglas Lute and Mr. John Feeley.

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<sup>3</sup> *Karadzic*, Order Pursuant to Rules 54 and 70, 5 March 2009.

<sup>4</sup> The United States' internal authorization process for interviews requires considerable time and resources, with multiple steps and multiple officials involved at various stages. Consequently, Accused's portrayal of an interview with a high-ranking United States official as a "one hour" event that "is a small inconvenience" (Request, para. 16) does not reflect the

8. It bears noting in this regard that, during his April 16, 2009 interview, Ambassador Goldberg had indicated that Mr. John Feeley was one of the participants in the July 18-19, 1996 meetings in Belgrade that have been the focus of Accused's investigations. Thus, it is simply not true, as stated in the Accused's Request, that Mr. Feeley's identity was not "revealed" until the interview of Ambassador Butler.<sup>5</sup>
9. When asked for clarification as to why these additional interviews are necessary and substantively different from the interviews with Ambassadors Butler and Goldberg, Accused's legal associate Peter Robinson responded indicating that he wanted information about "how they informed their agencies and superiors" and "as participants in the meeting, we are interested in their best recollection of what was discussed,"<sup>6</sup> but provided no further explanation as to why such interviews would not be redundant.
10. Nevertheless, the United States still sought to obtain the requested information and duly reported to Accused that it had "contacted Lt. Gen. Lute and Mr. Feeley and confirmed that (a) they have no knowledge of any agreement reached at that meeting (or elsewhere) to provide Dr. Karadzic immunity from prosecution in The Hague, and (b) notes from the meeting, if any were ever taken, either no longer exist or are no longer in their possession. Regarding reporting back to their agencies and superiors, they indicated that any such reporting was done either orally or via Ambassador Butler's July 19, 1996 cable, which [Accused had] already received."<sup>7</sup>
11. Thus, despite U.S. Government's efforts to accommodate every request Accused has made, Accused continues to make baseless assertions, such as his claims that the United States "did not produce any contemporaneous records

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true costs and willfully ignores the fact that use of these resources limits the United States' ability to promptly respond to other Tribunal requests for information.

<sup>5</sup> Request, para. 8. It also bears noting that at no time -- from Accused's initial request to the United States on December 11, 2008 until now -- did Accused ask the U.S. Government to supply the names of the individuals present at those meetings.

<sup>6</sup> Annex A.

<sup>7</sup> Request, Annex A, p. 2.

of the meeting of 18 July 1996,”<sup>8</sup> that “a deliberate effort” existed to not document the meeting,<sup>9</sup> or that “non-State Department employees may be more likely to be forthcoming.”<sup>10</sup> It seems clear that Accused will continue to make repeated requests and unfounded allegations, and that he will consider any response that does not corroborate his story to be “incomplete,” “non-contemporaneous” or “not forthcoming.”

### **III. The Request Fails to Meet the Requirements for Issuance of a Subpoena<sup>11</sup>**

12. As noted by the Appeals Chamber, under Rule 54 of the Tribunal’s Rules of Evidence and Procedure, a Trial Chamber “may... issue a subpoena when it finds that doing so is ‘necessary for the purposes of an investigation or for the preparation or conduct of a trial.’”<sup>12</sup>
13. An applicant for a subpoena must demonstrate “a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues.”<sup>13</sup> That is, an applicant must establish that the information sought is necessary for the

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<sup>8</sup> *Karadzic*, Holbrooke Agreement Motion, 25 May 2009, para. 30. This statement is simply not true. The United States provided eight documents (Annexes B-I), including a cable, drafted the second day of the meetings, July 19, 1996 (Annex I); a July 20<sup>th</sup> cable setting forth Karadzic’s commitments and a press conference held by Ambassador Holbrooke immediately following the July 18-19 meetings (Annex C); a July 21<sup>st</sup> letter from Ambassador Holbrooke to Slobodan Milosevic regarding the July 18-19 meetings (Annex H); and a July 24<sup>th</sup> report to the Security Council about the July 18-19 meetings (Annex E).

<sup>9</sup> Holbrooke Agreement Motion, 25 May 2009, para. 33. The information that the United States has provided to Mr. Robinson, including Ambassador Butler’s unequivocal negative response when asked whether he had been instructed not to produce records of the meeting, clearly contradicts this unfounded assertion. Request, Annex A, p. 3.

<sup>10</sup> Request, para. 9.

<sup>11</sup> The Appeals Chamber in *Krstic* held that requests to call government officials fall under Rule 54. *Prosecutor v. Krstic*, Decision on Application for Subpoenas, 1 July 2003, para. 10. The United States respectfully believes the case was wrongly decided, and that Rule 54*bis* is the correct framework. This submission, however, follows the analysis used in *Krstic* and subsequent Tribunal decisions; in doing so, the United States reserves its right to seek reconsideration of this question, as necessary. The United States only notes here the potentially unfair and asymmetric consequences of the approach taken by the *Krstic* Chamber: in the event a State refuses to authorize its officials to testify to information acquired in the course of their official duties, under the *Krstic* reasoning the consequences – which could include imprisonment and/or a fine – are borne not by the State but by the individual.

<sup>12</sup> *Prosecutor v. Brjdanin and Talic*, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

<sup>13</sup> *Prosecutor v. Halilovic*, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6.

resolution of specific issues in the trial (the “legitimate forensic purpose” requirement) and such information must be unavailable through other means (the “last resort” requirement).<sup>14</sup>

14. The Appeals Chamber has further noted that the discretion of a Trial Chamber to issue a subpoena is not unfettered, and should take into account “not only the interests of the litigants but the overarching interests of justice and other public considerations.”<sup>15</sup> As the Appeals Chamber has cautioned, “[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.”<sup>16</sup> Trial Chambers should ensure that the compulsive mechanism of a subpoena is “not abused.”<sup>17</sup>

**a) Legitimate Forensic Purpose**

15. Accused has failed to demonstrate *a reasonable basis* for his belief that the prospective witnesses would be *likely to provide material information*. As the United States communicated to Accused’s legal associate in writing on June 12, 2009, both Lt. Gen. Lute and Mr. Feeley have confirmed that they have no knowledge of any immunity agreement, have no notes of the 1996 meeting, and that reports to Washington were delivered orally and via a July 19, 1996 reporting cable.<sup>18</sup> In light of this communication, Accused has no reasonable grounds for believing that the two men are likely to provide material information that may assist him; his assertion that they have such information has no basis in fact or logic and is simply without merit.
16. Accused has also failed to establish that the information sought is *necessary* for the resolution of specific issues in the trial.<sup>19</sup> First, Accused’s legal associate has already spoken with three of the seven U.S. officials present at the meeting; the issuance of a subpoena is not justified in situations where the

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<sup>14</sup> *Prosecutor v. Milosevic*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder, 9 December 2005, paras. 36-41.

<sup>15</sup> *Halilovic*, *supra* note 13, para. 7 and note 15 (citing to *Brjdanin*).

<sup>16</sup> *Brjdanin*, *supra* note 12, para. 31.

<sup>17</sup> *Halilovic*, *supra* note 13, para. 6.

<sup>18</sup> *Supra* note 7.

<sup>19</sup> *See Milosevic*, *supra* note 14, para. 39.

information sought is merely of a cumulative or corroborative nature, as here.<sup>20</sup>

17. Second, the issue of whether factual information concerning the alleged immunity deal may be necessary for the resolution of a specific issue at trial is currently under consideration by the Trial Chamber; at the moment, the only indication the Trial Chamber has offered regarding the potential relevance of an immunity agreement is the statement that if such an agreement existed it *might* be of relevance for mitigation purposes at sentencing, in the event Accused is convicted.<sup>21</sup> Unless it is established that information concerning the alleged agreement is necessary for the resolution of a specific issue at trial, there is no justification for the use of compulsive measures.<sup>22</sup>

**b) Last Resort Requirement**

18. Accused cannot meet the last resort requirement because the United States has already provided him, in a variety of formats and from a number of sources, the information he seeks about the July 18-19, 1996, meetings. As noted above, he has received a number of documents, and his legal associate has spoken with three of the U.S. officials present at the meeting.<sup>23</sup> Furthermore, in an additional effort to be cooperative, the United States provided Accused in writing with the specific information he claimed to seek from Lt. Gen. Lute and Mr. Feeley.<sup>24</sup> Thus, the information sought with respect to these two gentlemen was not only obtainable by other means, but was actually obtained through the voluntary cooperation of the United States.
19. That Accused has chosen to ignore, disbelieve, or discount the information provided is his decision, but it cannot serve as a basis or justification for a resort to compulsive measures. The United States, despite its serious reservations about the nature of Accused's requests and his distortions in the

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<sup>20</sup> *Prosecutor v. Haradinaj*, Decision Denying Subpoena Ad Testificandum..., 2 November 2007, paras. 4-5.

<sup>21</sup> *See* note 2. The Trial Chamber, as opposed to the Pre-Trial Chamber, will ultimately decide the issue of relevance for mitigation purposes, and may not find the issue relevant.

<sup>22</sup> *See, e.g., Milosevic, supra* note 14, para. 64.

<sup>23</sup> Request, Annex A, p. 1.

<sup>24</sup> *Supra* note 7.

presentation of that information,<sup>25</sup> has consistently sought to act cooperatively.<sup>26</sup> Under these circumstances, Accused cannot make a good-faith claim that he has been unable to obtain the information he seeks without resort to the coercive powers of the Tribunal.

**c) Trial Chamber Discretion and Other Considerations**

20. As discussed above, in exercising its discretion on whether to issue a subpoena, a Trial Chamber should take into account “not only the interests of the litigants but the overarching interests of justice and other public considerations.”<sup>27</sup> In the present case, beyond Accused’s purported needs, there are a couple of issues that deserve consideration.
21. First, as mentioned briefly above, the Trial Chamber currently has pending before it a motion by Accused requesting an evidentiary hearing on the alleged “Holbrooke Agreement” as well as an opposition filed by the Prosecution. Unless and until the Chamber determines that an evidentiary hearing is warranted, it would be particularly inappropriate to issue subpoenas to Lt. Gen. Lute and Mr. Feeley. Issuing subpoenas at this juncture would also constitute a waste of the time and resources of both the Tribunal (which, among other things, is funding Accused’s defense) and the United States Government.
22. Second, although the United States firmly believes that Accused deserves a fair hearing, it does not believe that Accused should be given the leeway to abuse the good-faith efforts of a State to cooperate with the Tribunal. Moreover, the Accused – whether through frustration, a desire to seek continued publicity, or for any other reason – should not be allowed to pursue frivolous and meritless avenues to delay his trial and distract attention from the gravity of the crimes he is alleged to have committed.

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<sup>25</sup> See, e.g., Request, Annex A, p. 2-3.

<sup>26</sup> The *Milosevic* Decision (*supra* note 14), although it does not discuss voluntary cooperation, determined there is no difference in substance or stringency between the requirements for issuance of a binding order on a State under Rule 54*bis* and those for a subpoena under Rule 54. *Id.* paras. 26, 32. Rule 54*bis* (B)(ii) requires applicants to make a good-faith attempt to secure voluntary cooperation before moving for a coercive order.

#### IV. Conclusion

23. The Request fails to meet the requirements for the issuance of a subpoena and constitutes an abuse of the United States' good-faith efforts to cooperate with the Tribunal. The United States respectfully requests that it be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Denise G. Manning", is written over a horizontal line.

Denise G. Manning  
Legal Counselor  
Embassy of the United States  
The Hague

Word count: 2660

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<sup>27</sup> *Halilovic, supra* note 13, para. 7 and note 15 (citing to *Brjdanin*).